

(2021) 04 SHI CK 0164

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 623, 624 Of 2008

Ashiq Ali (Deceased) Through His Lrs And Others	APPELLANT
Vs	
Yasin Mistri (Deceased) Through His Lrs And Others	RESPONDENT

Date of Decision : 20-04-2021

Acts Referred:

Indian Succession Act, 1925 — Section 63, 115, 116, 117
Evidence Act, 1872 — Section 67, 68

Citation : (2021) 04 SHI CK 0164

Hon'ble Judges : Tarlok Singh Chauhan, J

Bench : Single Bench

Advocate : Y. P. Sood, Bimal Gupta, Poonam Moghta, Vinod Chauhan

Final Decision : Dismissed

Judgement

Tarlok Singh Chauhan, J

1. Since common questions of law and facts arise for consideration in both the appeals, they are taken up together and are being disposed of by way of a common judgment.

2. Briefly stated the facts of the case are that respondent No. 1 filed a civil suit for declaration and permanent prohibitory injunction against the appellants alleging herein that the Will Exhibit DW-2/A executed by the mother of appellant No. 1, respondents and grandmother of the appellants No. 2 to 4 in respect of properties owned and possessed by her in favour of the appellants No. 2 to 4 is illegal and wrong and she did not execute any legal and valid will during her lifetime nor she could execute the Will as per the Personal Law applicable to the parties and it was further the case of respondent No. 1 that in case the Will is held to be legally validly executed in that event also the same is not valid beyond 1/3rd share as the Will beyond 1/3rd share by Muslim is not permissible under the Personal Law.

2. The appellants contested the claim of respondent No. 1 with respect to the

genuineness of the Will and averred that the Will Exhibit DW-2/A is the last legal and valid Will executed by late Smt. Tulsa in favour of the appellants No. 2 to 4 and this fact about the execution of the Will was also in the knowledge of respondent No. 1. In pursuance to the Will which was registered after the death of Smt. Tulsa mutation of inheritance was also entered and attested in favour of appellants No. 2 to 4.

3. The learned Trial Court after framing the issues and evaluating the evidence decreed the suit partly by holding the Will to be duly executed in accordance with law, however, it came to the conclusion that as the personal law applicable to the parties, did not permit Smt. Tulsa to execute the Will beyond 1/3rd of her property, therefore, Will was held to be valid only to the extent of 1/3rd share and remaining 2/3rd share was held to have devolved upon the legal heirs of late Smt. Tulsa.

4. The appellants feeling aggrieved and dis-satisfied with the judgment and decree passed by the learned Trial Court, filed an appeal before the learned Appellate Court below claiming therein that the Will be held to be legal and valid in its entirety and respondent No. 1 also filed separate appeal assailing the decree to the extent which was against him. The learned first Appellate Court below decided both the appeals vide a common judgment and decree and the appeal filed by respondent No. 1 was allowed whereas appeal filed by the appellants was dismissed and the finding recorded by the learned Trial Court below in favour of the appellants to the extent that the Will is held to be legally and validly executed by Smt. Tulsa were set aside in its entirety.

5. Feeling aggrieved and dis-satisfied with the impugned judgments and decrees passed by both the Courts below the appellants preferred the Regular Second Appeals, which came to be admitted on 24.11.2008 on the following substantial questions of law:-

"1. Whether adverse interference against the due execution of legal and valid Will could be drawn by the learned Appellate Court below for not examining the scribe to prove the Will?

2. Whether the learned first appellate court below has misread and misappreciated the statement of DW-2 Lavinder Singh attesting witness who has supported the due execution and attestation of the Will and the findings recorded by the first appellate court below are vitiated on this Count?"

Substantial questions of Law No. 1 and 2

Since both the questions are interlinked and inter connected, therefore, they are taken up together for consideration and are being answered by common reasoning.

6. At the outset, it needs to be observed that the parties to the lis are Muslims and governed by Mohammedan Law and the law of Will as prescribed in Chapter-III, Rule 184 of the Mohammedan Law makes it clear that a Will may be

executed in writing or oral, showing a clear intention to bequeath the property. However, a limitation is also prescribed that a valid Will by a Mohammedan will not be for more than 1/3rd of the surplus of his/her estate and that to an non-heir. The Muslim Law of Will by Mulla "Principles of Mohammedan Law" provides for a Will in Chapter-IX in Sections 115, 116 and 117.

7. It would be noticed that the learned first Appellate Court has drawn an adverse inference against the appellants on the ground that the scribe of the Will Shri Shamshad Ahmed Qureshi even though live has not been produced in the witness box. This would be clearly evident from the para-19 of the judgment which reads as under:-

"The will is shown to have been scribed by the documents writer Shri Shamshad Ahmed Qureshi and attested by Mohd. Ramzan and Lovender Singh. It would be seen that scribe Shamshad is alive but has not been produced in the witness box. DW-1 Ashiq Ali in his cross-examination has admitted that Shamshad Qureshi is alive and residing in Gunnughat at Nahan. Although he has stated that he has heart trouble and he is not in a position to walk but his statement could have been got recorded by getting a local commissioner appointed. No such steps were taken by the defendants. One attesting witness Lovender Singh has been produced whereas another attesting witness Mohd. Ramzan has died. Since Mohd. Ramzan is no more, the scribe who is alive should have been produced in the witness-box. His non-production or for non getting his evidence recorded by appointment of commission an adverse interference is required to be drawn against the execution of the Will. Then Lovender Singh does not state to have witnessed Smt. Tlsa putting her signatures. As already stated Mohd. Ramzan has already died and scribe Shamshad Ahmed Qureshi has not produced thus there is no evidence to prove that the witness had seen Smt. Tulsa putting her signatures over the Will. Under Section 63 of Indian Succession Act, the marginal witnesses while appearing have to prove under Section 68 of the Indian Evidence Act that the attestor had scribed the Will in their presence and after having heard and understood the same had signed or put her thumb impression in their presence and further that both attesting witnesses then appended their signatures in presence of the attestator. These requirements of law have not been proved to have been fulfilled by Lovender Singh, the only attesting witness produced in the Court. Regarding the mode of execution the case cited in 2007 (3) RCR 240 is referred to. Also, the case cited in PLR 1998 (2) 524 is relevant. These were held to be the inherent defects in the execution of the Will in the citation CCC 1996 (1) Supreme Court 37."

8. It is vehemently argued by Shri Y. P. Sood, learned counsel for the appellants that the findings recorded by the learned Courts below are totally perverse as there was no requirement of law to examine the scribe of the Will, more especially, when one of the attesting witness i.e. Lovender Singh in this case has already been examined.

9. On the other hand, Shri Bimal Gupta, learned Senior Advocate, duly assisted

by Ms. Poonam Moghta, learned Advocate, would argue on the strength of the judgment of this Court in *Mehandi Hassan and others vs. Rafiquan and others* (2001) 2 Shim. LC. 231 that the mode of proving the Mohammedan Will is different from proving Will governed by the provisions contained in Part-VI of Indian Succession Act, 1925. While a Mohammedan Will is required to be proved under Section 67 of the Evidence Act, 1872, a Will governed by the provisions contained in Part VI of the Indian Succession Act, 1925, is required to be proved as laid down under Section 68 of the Evidence Act, 1872. Therefore, the validity of the will in question Exhibit DW-2/A is required to be examined under the provisions of Section 67 of the Evidence Act.

10. Section 67 of the Evidence Act, reads as under:-

"67. Proof of signature and handwriting of person alleged to have signed or written document produced.- If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting."

11. Where the document is written by one person and signed by another, the handwriting of the former and the signature of the later have both to be proved in view of Section 67 of the Evidence Act. What Section 67 of the Evidence Act refers to is the signature of a witness who counter signs a document as a person who was present at the time when the document was signed by another person. This was so held by the learned Division Bench of the Gujarat High Court in *Miyana Hasan Abdulla and another vs. State of Gujarat* AIR 1962 Gujarat 214 and I see no reason to take a different view.

12. In such circumstances, obviously no exception can be taken to this part of the findings recorded by the learned first Appellate Court, whereby it drew an adverse inference against the appellants for not examining the scribe of the document Shri Shamshad Ahmed Qureshi, who was very much alive at that time and even, in case, he was suffering from ailment his statement could have conveniently been recorded on commission. The non-examination of the scribe assumes importance because the witness Lovender Singh DW-2 does not state to have witnessed Smt. Tulsa, the testator, putting her signatures over the Will.

Substantial questions of law are answered accordingly.

13. In view of the aforesaid discussion, I find no merit in these appeals and the same are accordingly dismissed, so also pending application(s), if any. Parties are left to bear their own costs.